No. 11953

United States
Court of Appeals
for the Ninth Circuit

EMMA GRACE LOWE,

Appellant,

vs.

UNITED STATES SMELTING, REFINING AND MINING COMPANY, a corporation, FIRST NATIONAL BANK OF FAIRBANKS, Executor of the Estate of GUSTAF SODERBLOM, deceased, and WALTER JENSEN,

Appellees.

Appellant's Reply Brief

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EMMA GRACE LOWE, Appellant,

vs.

UNITED STATES SMELTING, REFINING and MINING COMPANY, et al, Appellees.

APPELLANT'S REPLY BRIEF

Reply to Appellees' Statement of the Case

At the top of page four of appellees' brief appear certain quotations from pages ten and eleven of appellant's opening brief regarding which appellees' counsel charge:

> "These statements are gratuitous, unsupported by any evidence in the transcript, and fly in the teeth of the verdict. (Tr. pp. 46-47) and the Findings of Fact (Tr. pp. 58-9) to the effect that all required labor was done."

We must take sharp issue with this contention. The Bill of Exceptions, duly approved and settled by the trial judge, amply supports the quoted matter in appellant's brief. (pp. 87-135 Tr. of Record) We direct attention particularly to exceptions numbered one to four inclusive, pages 88 to 102 Transcript. Space does not permit of extended quotation, but for convenient reference a quotation from Exception No. 4 has been set out on page 1 appendix and should be sufficient.

If, as appellant contends, the Waskey Act has not been impliedly repealed, so that no resumption of work is permitted, and in the absence of proper and timely filing of proofs of labor the burden of proof was shifted to the appellees to show that the work was done, then it is quite obvious that there has been a complete failure

of proof on the part of appellees, and appellant's motions for non-suit and demurrer to the evidence made at the close of plaintiff's case in chief (pp. 89, 90 Tr. of R.) and the motions for non-suit and for directed verdict at the close of all the evidence (p. 102 Tr.) should have been granted,

The purpose of this portion of appellees' brief seems to be to induce the court in the event the case is reversed to send the matter back for a new trial instead of directing a judgment of dismissal. Appellant would most vigorously oppose any such outcome. Appellees are the moving parties in these cases. The trial in the court below consumed eight days (August 6 to 15, 1947. See pp. 63-64 Tr.) Both parties had ample opportunity to present their respective contentions. If appellant's theory is correct, this case should have been terminated by dismissal, either through a non-suit or directed verdict in the lower court. It is submitted that if she prevails on this appeal, such a dismissal should now be directed. We direct attention to the quotations from 5 Corpus Juris Secundum, Title "Appeal and Error," Sec. 1927 and 1928, p. 1435, and 1437 appearing on page 2, appendix

Identical statements will be found in 4 Corpus Juris at pages 1189 and 1190. While appellees do not raise the point it may perhaps be well to point out that although tried with an advisory jury, these were equity suits, not actions at law. There is accordingly no prohibition upon the court under the 7th Amendment to the Federal

Constitution as construed in the case of Slocom vs. New York Life Insurance Company, (228 U. S. 364, 33 Supreme Court 523) against rendering a final decree of dismissal. While we are certainly making no bid for sympathy from this court on that account, appellant is a private individual with limited means. She is not a multi-million dollar corporation like the principal appellee, United States Smelting, Refining and Mining Company. As will be apparent from the record, the trial of these cases below and the expense of this appeal have already been a severe burden upon her. A judgment of reversal, merely sending the case back for retrial, followed by another protracted trial in the district court and the possible prospect of a further appeal, would, from her standpoint, be almost as great a calamity as an affirmance. The one advantage which a large organization enjoys in litigation against a private individual is that to the organization, expense and delay may mean little, while to the individual they are frequently everything. We most urgently request that if appellant's contentions are sustained, the cases be settled here and not sent back for a retrial.

Reply to Appellees' Argument on Implied Repeal of the Waskey Act

This portion of appellees' brief (pp. 5 to 29) covers a number of different points and it is believed that our reply thereto may be rendered easier to follow if we undertake to split the material up into three subheads.

(a) *Shifting Burden of Proof*: The italicized portion of the statement appearing on page 8 of appellees' brief:

> "A claimant who proves a valid mining location has made a prima facie case *that as of the date of his pleading he has maintained his claim in good standing by performing the annual labor.*"

and subdivision (b) of appellees' table on page 14, both arise as the result of the same fundamental error apparent in the District Court's decision and discussed on pages 42-45, appellant's opening brief.

There is no question at all but that in Alaska, Oregon and elsewhere throughout the mining states, forfeiture is an affirmative defense and the burden is upon the party asserting it to plead and prove it in the first instance. Hammer vs. Garfield Mining Company, and the other authorities cited on page 7 of appellees' brief, are good law. They represent the rule in jurisdictions having proof of labor statutes like Alaska's Waskey Act as well as states that do not. The first two cases in counsel's list are California cases, yet as appears from one of them, Harris v. Kellogg, 117 Cal. 484, 49 Pac. 708, California at that time had a proof of labor statute much more drastic in its provisions than even the Waskey Act. Under the then California law, the proof of labor had to be filed:

> "Within thirty days after the time limited for performing such labor or making such improve-

ments, and that upon failure to do so, the mine shall be open to relocation." (49 Pac. 709)

The basis for the rule announced by these authorities, is succinctly stated in the early Oregon case of Bishop vs. Baisley, 28 Oregon 119, 41 Pac. 937. See quotation page 3, appendix.

The above case is cited as authority for the same rule by this court in the case of Cache Creek Mining Co. v. Brahenberg, (CCA 9th) 217 Federal on 241:

> "A forfeiture must be set up before it can be insisted upon. (Bishop v. Baisley, 28 Oregon 119, 41 Pac. 936)"

This case was an appeal from Alaska and was decided in 1914, long after the Waskey Act was in effect there.

What these cases hold, and all that they hold, is that the rights arising from the location of a mining claim continue until a forfeiture is shown. This makes forfeiture an affirmative defense, and casts the burden upon the party claiming a forfeiture to allege and prove it. There is no support in any of the authorities for the statement quoted from p. 8 of appellees' brief and their case of Renshaw v. Switzer (Mont) 13 Pac. 127,contains an excellent statement of the basis for the rule in terms very similar to those announced in Bishop v. Baisley at the bottom of page 127 and the top of 128.

Indeed, appellees' counsel are arguing in a circle

when they make such an assertion. If, as shown, forfeiture is an affirmative defense and must be affirmatively alleged and proved by the party relying on it, there is no occasion for the claimant under the original location to make out a prima facie case of performance and no reason for any presumption that he has done the work.

But, although these authorities announce the rule that forfeiture is an affirmative defense which must be pleaded and proved, and accordingly, the party alleging forfeiture has the primary burden of proof to establish it, they do not in any way suggest how the party having that burden shall sustain it or that the initial burden of proof may not, in a proper case, and on a showing of appropriate facts, *be shifted.* Space limitations upon this reply brief do not permit of any elaborate technical discussion or fine spun distinctions, but it is well established that the original burden of proof, or as it should perhaps more accurately be called, the burden of going forward with evidence, frequently shifts during the course of the trial. See 20 American Jurisprudence, Title "Evidence", Section 132 and 133, pages 134 to 136, 31 Corpus Juris Secundum, title "Evidence", Sections 110 and 111, page 718 to 720. This is precisely the effect of such statutes as Alaska's Waskey Act and the similar statutes in force in the states of New Mexico, Idaho and now Oregon. (See pages 44 to 48 Appellant's Opening Brief) *They shift the burden of proof.*

In the present cases, appellant under the rule an-

nounced by Hammer v. Garfield Mining Co., Bishop v. Baisley and similar cases, being the party alleging and claiming the forfeiture had the primary burden of proving it, but when proof was produced or offered that proofs of labor were not filed, the burden of proof under the express provisions of the Waskey Act was shifted to appellees:

> "Such affidavits shall be prima facie evidence of the performance of such work or making of such improvements, *but if such affidavits be not filed within the time fixed by this act, the burden proof shall be upon the claimant to establish the performance of such annual work and improvements.*" (p. 10 appellees' brief.)

Before leaving this subject, it may be well to again discuss briefly the purpose and effect of this proof of labor phase of the Waskey Act and similar statutes. The General Mining Laws of the United States made applicable to the Territory of Alaska by the Act of June 6th, 1900 (p. 15 appellant's opening brief, p. 8 appellees' brief) contain no provisions for filing proofs of labor and under such General Laws the filing or failure to file a proof of labor *has no evidentiary value either way.* This is a subject to which the General Mining Laws do not extend. The Waskey Act, *in the same sentence*, provides:

> 1. That the affidavit if filed shall be prima facie evidence of the performance of the work.

2. If not filed it shifts the burden of proof upon the claimant to show that the work was done, or, in other words, and as set forth in the Idaho and Oregon Statutes; it shall be prima facie evidence that the labor has not been done. (See page 45 appellant's opening brief, and Sec. 108-315 Oregon Compiled Laws Annotated.

All these laws in fact mean substantially the same thing, although the wording of the Alaska and New Mexico Acts uses the term "burden of proof", while the Oregon and Idaho statutes refer to "prima facie evidence." Now it will be apparent at once on a moment's reflection, that since the General Mining Laws contain no provision for filing proofs of labor at all, there would be exactly the same ground for arguing that the first clause of the sentence which makes the affidavit when filed prima facie evidence that the work was done, is contrary to the General Mining Laws, as there is for saying that the second clause is, which makes the failure to file prima facie evidence that the work was not done, or stated otherwise, shifts the burden of proof to the claimant to show that it was. If one provision of the Act contravenes the General Mining Laws, *it follows inescapably that the other must, because both do exactly the same thing;* that is, legislate upon a subject not previously covered by those laws. Yet appellees' counsel do not for a moment intimate that the first clause of the sentence is invalid, (See page 11, appel-

lees' brief) and appellees themselves claimed the benefit of this clause when they undertook to, and did, introduce their proofs of labor for the years 1938-9, 1939-40, 1940-1, plaintiff's exhibits "X", "Y", and "Z" in an effort to show resumption of work. (See exception No. 8, pages 116 to 131 Tr.) If appellees' contentions were correct, and this provision of the Waskey Act had in fact been contrary to the General Mining Laws, and impliedly repealed in 1938 as they so vigorously assert, then these proofs of labor would be mere voluntary ex parte affidavits and there would have been no basis whatever for admitting them. Appellees' counsel, in other words, *rely upon the favorable prima facie effect of a proper filing during certain years while they vigorously oppose the unfavorable effect of failing to file during previous years.*

Now the purpose of all this discussion and its effect on the present appeal is simply this. As pointed out in appellant's opening brief, page 35, the Waskey Act covers two separate matters. First, it provides for the filing of proofs of labor and their contents, makes the affadivits prima facie evidence if filed and shifts the burden of proof if they are not filed. Secondly, it provides that upon failure to do the work the claim becomes automatically forfeited.

The second aspect of the Waskey Act, the automatic forfeiture provision, was held inconsistent with and to impliedly repeal the resumption of work doc-

trine of the General Mining Laws in Thatcher v. Brown.

The first phase of the Waskey Act, which we we are now discussing, that is, the evidentiary effect of filing or failing to file *is not inconsistent with the General Mining Laws.* We stress again, as pointed out in our opening brief, pages 45 to 47, Alaska's Waskey Act appears to have been copied from the New Mexico Statute. There are now at least three states (Idaho, New Mexico and Oregon) in addition to Alaska, that have substantially identical laws. Of course, Alaska's Waskey Act, being a Congressional enactment would be valid whether in conflict with the General Mining Laws or not, but the validity of the state statutes could only be sustained if not in conflict with the Federal Mining Laws. See the quotation from Upton v. Santa Rita Mining Co., 14 N. Mex. 96, 89 Pac. 275 on 287, set out at page 46, appellant's opening brief. The New Mexico court quotes from the second edition of Lindley on Mines. The third edition contains an identical statement. A quotation from Volume 2, Sec. 636, pages 1582 and 1583 of Lindley's Third Edition appears on page 4 of the appendix.

Therefore, since not in conflict with the General Federal Mining laws, these provisions of the Waskey Act would not be impliedly repealed in any event by the 1938 amendment when the General Mining Laws were, as the trial judge put it, "again put forward as the Law of Alaska."

As will more fully appear in our later discussion of appellees' point that " the repeal of the Waskey Act put the burden of proving forfeiture, before and after its repeal, on appellant" this phase of the matter really determines the present appeal.

(b) *Implied Repeal of Automatic Forfeiture Clause.* In considering appellees' authorities on this point, it is important to keep clearly in mind *exactly* what we are discussing here. We have, first, a general law, the Act of June 6, 1900, which extended the mining laws of the United States to the Territory of Alaska. (page 8, appellees' brief) Part of those Mining Laws was the doctrine of resumption of work. (page 6, appellees' brief) Secondly, we have the Waskey Act, *an independent intermediate statute,* (pp. 9-11, appellees' brief) which is inconsistent with the resumption of work doctrine and to that extent supercedes the former law. We stress that this is *an independent intermediate act,* because the rule might be entirely different if the Waskey Act, instead of being an intermediate act had been enacted as an amendment to the 1900 statute. Third, there is the 1938 amendment to the 1900 law which changes that law in certain particulars not involved here, and repeats the clause making the General Mining Laws applicable to Alaska.

By keeping these factors firmly in mind, we automatically eliminate most of the authorities cited in appellees' brief. For example, on page 16 there are cited

the two federal cases of Heinze v. Butte & B. Consol. Mining Co., 107 Fed. 165, and Columbia Wire Co. v. Boyce, 104 Fed. 172. Both these decisions, one from the Ninth Circuit and the other from the Seventh Circuit, deal with identical statutes. However, there the intermediate act was not a separate enactment but had been enacted as an express amendment to the former law, and the third amendment omitted some of the provisions included by the second. Both cases are accordingly in the same class as State v. Lightner, which is discussed in detail on pages 20 to 22, appellant's opening brief.

Several of appellees' cases do not deal with an intermediate act at all but merely announce the rule (which appellant has never disputed) that where a subsequent act is inconsistent with a prior enactment, it impliedly repeals the prior law to the extent of the inconsistency. On analysis, about the only case cited that lends even surface support to appellees' contention, is In re Metcalf's Estate, cited and discussed on page 18. This case bases its decision upon a quotation from 59 Corpus Juris 926, Section 528, which recites as an exception to the general intermediate amendment rule the case "where the reenacting act and the intermediate act are wholly inconsistent with each other and cannot stand together, the intermediate act will be regarded as repealed."

This case, however, should not be construed as placing the state of Pennsylvania at variance with the

general rule as is apparent from the subsequent case of In re Ferguson's Estate, 325 Penn. 34, 189 Atlantic 289, which contains a most elaborate statement of the rule and the reasons for it, as well as an analysis of the absurd consequences that follow from adopting a contrary construction. We refer first to page 290, (see page 5 appendix). The case of In re Metcalf's Estate is distinguished on page 292, 189 Atlantic. (See appendix 6). Finally the court points out in most able and convincing language the absurd results that follow from applying the doctrine that a later reenactment would repeal a former intermediate act, where there were several amendments to both statutes. A nearly identical situation could well have existed in this case. There have been two recent amendments to the 1900 law, Sec. 381, Title 48, USCA, the 1938 amendment under discussion here and another in 1947. (Chap. 514, Section 1, 61 Statutes 916)

Suppose there had also been amendments to the Waskey Act in minor particulars; say in 1942 and 1948. Then which act would repeal the other and for how long?

Lastly, in the very recent case of Petition of Indiana County, decided November 8, 1948, and reported at 62 Atlantic 2nd, page 3, the Pennsylvania Supreme Court in a case substantially on all fours with this one applied and followed the Intermediate Amendment Rule and distinguished the Metcalf case upon the

ground that the Intermediate Act and the last amendment were not *wholly inconsistent* with each other. An analysis of and quotations from the Indiana County case will appear on page 8 of the appendix.

In the case at Bar it is, of course, at once apparent that the two acts in question, the Waskey Act and the 1938 amendment to the 1900 Law which again reiterates that the Federal Mining Laws are extended to the territory of Alacka could not be wholly inconsistent but at most only *partially so.* The Federal Mining Laws cover a large number of subjects other than the doctrine of resumption of work, which was impliedly repealed by the Waskey Act, and the Waskey Act is itself entirely consistent with the Federal Mining Laws in many respects. The two laws not only can stand together but have ever since 1907. The general mining laws except as expressly modified by the Waskey Act or other similar statutes have been and still are extended to and the law of the territory of Alaska.

Before closing on this phase it may be well to mention certain cases discussed by Judge Pratt, although not referred to in appellee's Brief. Judge Pratt discusses the so-called exception under his Point IV (West Publishing Company's Point 5) on pages 922-923 of 74 Federal Supplement. The Judge cites the case of Hawes vs. Fliegler (Minn.) 92 N. W. 223. To the quotation set out in the Federal Supplement we would like to add the following from page 224: "A

statute amending a previous act, while it may not ordinarily affect an intermediate law, if its terms give best expression to the legislative will, might be held to do so if a reasonable regard for the apparent purpose of the lawmakers required that result."

To the same effect is the subsequent case of State vs. Klasen (Minn.) 143 N. W. 984 on 985. (see 74 Fed. Sup. 923)

The trial Judge also cites Buchsbaum and Co., vs. Gordon (Ill.) 59 N. E. 2nd 832, from which we quote on page 837:

> "In all cases the primary question is the intention of the Legislature rather than any technical priority of the passage of the Acts."

These Minnesota and Illinois cases while recognizing the Intermediate Amendment rule as will appear from their own recitals as well as other decisions from the same jurisdictions (see Powell vs. King (Minn.) 80 N. W. page 850; Nelson vs. Itasca County (Minn.) 155 N. W. 752 on 754; Hall vs. Village of Aurora (Minn.) 196 N. W. 465 on 466, and Klemme vs. Drainage District (Ill.) 43 N. E. 2nd 966 on 968) stress the proposition that the rule is a canon of construction only and must yield to the true legislative intent if it can be ascertained.

If we are to be governed by the actual intent of Congress then it is perfectly obvious, of course, that the only changes intended by Congress in passing the

1938 amendment were those regarding mining on and below tide water lands. This will appear from the report accompanying the Bill in the Senate which is set out in full in the appendix at pages 10-20. It is very clear from this report that Congress never had the remotest intimation that the amendment would be held to impliedly repeal the Waskey Act or similar laws or any intention to affect that Act in any particular.

(c) *Effect of Implied Repeal on Other Laws*: Appellees' counsel assume (see pp. 12, 13 and 27, Appellees' Brief) that the only effect of the implied repeal of the automatic forfeiture provision of the Waskey Act will be to restore the resumption of work doctrine in Alaska and make the law of Alaska, in this regard, the same as that of other states. Appellees overlook however, that the Waskey Act *is only one of a series of special mining laws applicable to Alaska which modify or conflict with the General Mining Laws to a greater or lesser extent.* We will refer briefly to one of the others.

(1) Title 48, Sec. 386, U. S. C. A. (passed in 1910) extends the time for filing adverse claims until eight months after the close of the sixty day period of publication and the time for filing adverse suits until sxity days after the adverse claim is filed in the land office. Under the General Mining Laws, Title 30, Secs. 29 and 30, the adverse claim must be filed during the period of publication and the adverse suit within thirty days thereafter. If appellees were right, and the 1938

amendment wiped out everything in conflict with the General Mining Laws, *then these cases were commenced too late and the lower court never had jurisdiction to hear them in the first place.* (See Tr. pp .4, 5, 8, 9, 10, Smith v. Wheeler, 5 Alaska 282)

Accordingly, if appellees contentions are correct, and the 1938 amendment wiped out the automatic forfeiture clause of the Waskey Act because in conflict with the General Mining Laws, *then each and every one of these other statutes, including Sec. 386 were also wiped out because they are equally in conflict.*

Reply to Appellees' Point "The Repeal of the Waskey Act Put the Burden of Proving Forfeiture Before and After its Repeal on Appellant"

This point of appellees is important because of the admissions counsel make in their argument under it. They appear to concede (pp. 31-2) that the implied repeal of the automatic forfeiture clause in the Waskey Act in 1938 would not revive locations that had been forfeited by failure to do the work during the years prior to 1938 while the Act was admittedly in force. Appellees state "In the second proposition (Ap. Br. pp. 29-34) appellant argues that *appeal* (repeal) cannot affect rights vested or revive rights lost under the repealed statute. *Assuming that to be true, we fail to see what bearing it has on this case.*" (page 31 appel-

lee's brief) "No one but appellant has suggested that substantive rights might be revived by repeal." (p. 32)

As previously shown the automatic forfeiture clause of the Waskey Act is entirely separate from the provisions providing for the filing of proofs of labor and the evidentiary effect of filing or failure to file. The automatic forfeiture clause is in conflict with the resumption of work doctrine of the General Mining Laws, but the provisions for filing proofs of labor and the effect of failure to file upon the burden of proof are not in conflict with any provision of such mining laws. Therefore, appellant must prevail in this case whether the automatic forfeiture provision was impliedly repealed in 1938 or not. All the many years for which there was no proof of the performance of annual labor and in connection with which the failure to file proofs of labor shifted the burden of proof to the appellees, were prior to 1938. (See Ex. No. 4, pp. 100-102, Tr.)

Reply on Validity of Snowshoe Fraction Location

The following points are to be made in connection with the authorities cited by appellees under this point on pages 34 and 35 of their brief. First, all of appellees' authorities deal with *quartz claims*. The entire Chapter 2, of which Article 7 and Section 373 are a part, (p. 731, Lindley) deals with "lode claims or deposits in place." The cases of Crown Point Mining Co. v.

Buck; Doe v. Tyley and Upton v. Santa Rita Mining Co., all dealt with *quartz claims.* (See 97 Federal, 463 14 Pac. 375 and 89 Pac. 276) A very different rule applies as to placers as will appear from the quotations from Lindley and Stenfjeld v. Espe set out on page 21, appendix.

Second, in the cases appellees cite, the overlap was slight and inadvertent and there was good reason for the mistake. In Doe v. Tyley, the locations were made in the night time. (14 Pac. 375) In this case, the overlap is not slight. It covers three times the area open to location. The point is, that under Federal Mining Laws, the boundaries of this irregularly shaped claim, not located according to legal subdivisions, had to be marked on the ground so that they could be readily traced. (See Lindley on Mines, 3rd. Ed. Sec. 454, pp. 1069 and 1070) The lines of the Snow Shoe Fraction as now claimed, were never so marked. This claim is now described as a small triangle containing approximately two and a half acres. The area marked was a rectangle some four times as large, containing ten acres. The quotation from Stenfjeld vs. Espe, appendix p. 22, is particularly appropriate. The difference between the claim mentioned in the Espe case and the one involved here is one entirely of degree, not of principle. There the overlapping claim was forty acres in extent, here it was ten.

Reply to Appellees' Argument on Attorneys' Fees

On page 51 of appellant's opening brief it is stated: "The writer cannot find where this attorney fee clause has ever been construed by this court, or any reported decision of the Alaska District Courts." We obviously did not look hard enough. It now appears that we inadvertently broached a subject upon which the authorities are squarely in conflict, and this Court seems to be pretty definitely committed to a position in opposition to the Oregon cases upon which we relied. (See 20 Corpus Juris Secundum, p. 463, Sec. 219; 15 Corpus Juris, p. 118) Upon further consideration, we see no object in further pursuing this highly controversial point although the writer still feels that the authorities requiring independent proof of attorneys' fees state the better rule. It is noted that the Alaska statute applies equally to both plaintiffs and defendants and since the Trial Court has fixed the attorney fee to be allowed the plaintiffs at $500.00, without pleading, cost bill or proof, we take it that "What is sauce for the goose is sauce for the gander" and that if the appellant prevails on this appeal she is, as of course, entitled to a like award of attorneys' fees against the appellees.

Respectfully submitted,
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Excerpt from Exception No. 4:

"During the trial of these cases, the plaintiffs offered no testimony or evidence regarding the performance or non-performance of the annual labor and assessment work upon either of the claims involved in these actions, the L Association and Snow Shoe Fraction, during any of the years prior to the fiscal year beginning July 1, 1838, and offered in evidence no proofs of labor or suspension notices covering any of such years prior to said fiscal year. The defendant offered to prove, as set out in Exceptions No. 2 and 3, that no proofs of labor or suspension notices were filed covering either claim prior to the year 1914; that a proof of labor on the Snow Shoe alone was filed in 1915; nothing was filed for either claim in 1916 *** that there was no affidavits of labor filed or intentions to hold on the Snow Shoe claim except for the years 1915, 1917, 1918, 1919, 1923, 1928, 1939 and 1934, and that there were no affidavits of labor filed and no exemptions of labor or suspension notices filed for the years 1909, 1910, 1911, 1912, 1913, 1914, 1916, 1920, 1921, 1922, 1924, 1925, 1926, 1927, 1930, 1931, 1932, 1933, 1936, 937, and 1938 upon the L Association claim. (pp. 100-101 Tr.)"

Quotation from 5 Corpus Juris Secundum, page 1435, sec. 1927:

> "Substantially the same is the rule, confirmed by statute in some jurisdictions, that the Appellate Court will render or order the proper judgment for defendant or against plaintiff, where the Trial Court should have sustained a demurrer to plaintiff's evidence or should have, under the evidence, directed a verdict or given a peremptory instruction for defendant."

And on page 1437, Sec. 1928:

> "The rule permitting the Appellate Court to order or direct a dismissal or non-suit *is especially applicable where the lower court should have entered an order of dismissal or non-suit.*"

Quotation from Bishop vs. Baisley, 28 Ore. on 126-7:

"A mining claim subsequent to a valid location is property in the highest sense of the term. It may be bought and sold, and will pass by descent. It carries with it the 'exclusive right of possession and enjoyment of all the surface included within the lines' of location. The right is a valuable one, and is protected by law. It continues until there shall be a failure to represent the claim; that is, to do the requisite amount of work within the prescribed time. The right of possession and enjoyment acquired by location is kept alive by the representation prescribed by law, but, when not thus kept alive, the right is forfeited, and the claim is thereafter open for relocation. In order, therefore, to secure a valid location, *it must be established that rights acquired under a prior one upon the same claim have been forfeited. The affirmative of this proposition is always cast upon the party seeking to establish it, and hence, under the rules of pleading, it must be specially pleaded, where opportunity is offered, before a party can be heard to support it with evidence.*" (Citing many cases, including Hammer v. Garfield and Quigley v. Gillett)

Quotation from Lindley on Mines, 3rd Ed., pp. 1582-3:

> "In Idaho it is provided that the failure to file such an affidavit shall be considered prima facie evidence, that the requisite labor has not been performed, and likewise in New Mexico, such failure places the burden of proof upon the owner or owners of such claims to show that such work had been done according to law. Ordinarily the burden of proof rests with the party charging a forfeiture to show that the work has not been performed by the previous locator. In Idaho and New Mexico where there is a failure to file the proof of annual labor, or where it is not filed in time or the affidavit is defective, *this rule is modified and the burden is shifted. We cannot see any objection to this class of state legislation. The several states have the right to define the nature, degree and effect of evidence, within rational limits, and we do not think these provisions unreasonable.*"

In re Ferguson's Estate, 325 Penn. 34, 189 Atlantic 289, from page 290:

> "In re Toner's Estate, 260 Pa. 103 A 541, 544, the court dealt with the contention of implied repeal in circumstances quite like those now presented and quoted the well known rule which must now be applied. The court said: "It is established that: 'Where a statute merely re-enacts the provisions of an earlier one, it is to be read as part of the earlier statute, and not of the re-enacting one, *if it is in conflict with another passed after the first but before the last act; and therefore it does not repeal by implication the intermediate one.*' Endlich on the Interpretation of Statutes, 194, or as expressed in 36 Cyc. 1084: 'Nor does a later law, which is merely a re-enactment of a former, repeal an intermediate act which qualifies and limits the first one, but such intermediate act will be deemed to remain in force, and to qualify or modify the new act in the same manner as it did the first.' See, also, Lewis' Sutherland on Statutory Construction, Sec. 273, and In re Searight's Estate, 163 Pa. 210, 216, 218, 29 A. 800." 260 Pa. 49, 57, 103 A. 541. That principle is peculiarly applicable to the construction of both the Fiscal Code and the Fiduciaries Act and their relation to each other as indicating legislative intent."

Page 292, 189 Atlantic:

"The Commonwealth cited In re Metcalf's Estate (1935) 319 Pa. 28, 179 A. 587, in support of its position. In that case it was held that the Fiduciaries Act by implication repealed section 7 of the Act of June 1, 1915, P. L. 661, 71 P. S. Section 1787, on the ground that the provisions of section 7 dealt with the distribution of an insolvent estate. It provided that when a claim was made on behalf of the Commonwealth, or on behalf of any county or poor district, for reimbursement of moneys expended by the state, county, or poor district in the maintenance of insane, feeble minded, or other persons confined in institutions of the Commonwealth, the state and county should share in the proportion of the amount of maintenance expense. Section 13 (a) of the later act expressly dealt with the same subject and was so inconsistent with it that both could not stand. It was held that the Commonwealth must be last paid.

"It cannot be supposed, although this is what the Commonwealth's argument comes to, that in 1811, for example, the Legislature intended by implication to modify the provision of the Act of 1794 governing the distribution of an insolvent decedent's estate, and subsequently, by the dece-

dents' estate legislation of 1834, intended by implication to modify the taxing act of 1811 by restoring the provisions of the Act of 1794, and thereafter from time to time to repeat this conflict between the taxing and the decedents' estates legislation in 1879, 1917, and 1929. If such radical departure from legislative policy had been intended by the Fiscal Code, it would have been clearly indicated in the title as required by article 3, section 3, of the Constitution. While the title, abstractly considered, is very comprehensive, it must be construed in the light of the established legislative policy of the state which, as to the decedents' estate legislation, was established long before the Constitution of 1874, and since that time has been recognized as a well defined body of our law."

Analysis and Quotations from Petition of Indiana County (Penn. Nov. 8, 1948) 62 At. 2nd 3, on pages 4 and 5.

An original act of 1931 allowed two years redemption period from tax sales. A separate act passed in 1941 retained the basic two years period but changed the law by extending that period in certain cases, just as the Waskey Act retained some provisions of the General Mining Laws and changed others (resumption of work doctrine) then a third act of 1945 amended the original act of 1931 and repeated the general two year limitation period. The court says:

"The act of May 24, 1945, (P. L. 945) was an additional amendment to the Act of 1931; *it did not refer to the Act of 1941 at all;* *** It would seem clear that when there is applied to these successive acts the well established canons of statutory construction it cannot validly be maintained that the act of 1941 was repealed by tht Act of 1945. When a statute reenacts the provisions of an earlier one it is to be read as part of the earlier statute and not of the reenacting one, *if it is in conflict with another passed after the first but before the last act;* therefore, it does not repeal by implication the intermediate one, but the intermediate act will be deemed to remain in force and to qualify or modify the new

act in the same manner as it did the first." (Citing authorities) (page 4) *** "Of course, if the Act of 1945 and the intermediate Act of 1941 were *wholly inconsistent* with each other, the Act of 1941 would necessarily have to be regarded as repealed. In re Metcalf's Estate, 319 Pa. 28, 32, 179 Atl. 587, 588, but such is not the case and the provisions of the Act of 1945 and must therefore be considered as written into the original Act of 1931 as amended, leaving untouched the Act of 1941." (Page 5)

CALENDAR NO. 1743, 75th Congress, 3rd Session, SENATE, Report No. 1676 — CIVIL GOVERNMENT OF ALASKA — April 20 (calendar day, April 29), 1938.—Ordered to be printed.

Mr. Clark, from the Committee on Territories and Insular Affairs, submitted the following

REPORT

[To accompany H. R. 7778]

'The Committee on Territories and Insular Affairs, to whom was referred the bill (H. R. 7778) to amend section 26, title 1, chapter 1, of the act entitled 'An act making further provision for a civil government of Alaska, and for other purposes,' approved June 6, 1900, having considered the same, report thereon with a recommendation that it do pass with the following amendments:

Page 1, line 10, after the comma following the word 'That', strike all of the remainder of the line and strike all of line 1 on page 2 and insert in lieu thereof 'subject only to the laws enacted by Congress for the protection and preservation of the navigable waters of the United States,'

Page 2, line 24, after the word 'order,' strike out the remainder of the line and all of line 25 up to but not including the semicolon.

And that as so amended the said bill do pass.

The proposed amendments have been requested by the War Department in a letter dated January 22, 1938, addressed to the chairman of the Senate Committee on Territories and Insular Affairs.

The purposes of the bill are disclosed by the House report thereon, which embraces a letter dated October 14, 1937, from the Secretary of War addressed to the chairman of the House Committee on the Territories, stating that the Department has no objection to the passage of the bill if amended as suggested in that letter. The amendments then so recommended by the Secretary of War and mentioned in the House report were incorporated in the bill in the House.

The letter dated January 22, 1938, addressed to the Senate Committee on Territories and Insular Affairs, requesting the amendments hereinabove recommended, and the House report on the bill, which embraces the letter dated October 14, 1937, addressed by the Secretary of War to the chairman of the House Committee on the Territories, are as follows:

War Department,
Washington, 22, 1938.

Hon. Millard E. Tydings,
Chairman, Committee on Territories and
Insular Affairs,
United States Senate, Washington, D. C.

Dear Senator Tydings: The Department refers to H. R. 7778, Seventy-fifth Congress, first session, a bill to amend section 26, title 1, chapter 1, of the act entitled 'An act making further provision for a civil government for Alaska, and for other purposes,' approved June 6, 1900, recently passed by the House of Representatives and now before your committee.

At the request of the Honorable Lex Green, chairman of the Committee on the Territories, House of Representatives, the Department, under date of October 14, 1937, submitted a report on this bill. There is enclosed herewith a copy of this report, together with a copy of the bill as amended in red by the Department and submitted with the report.

The bill as passed by the House was not amended in line 10, page 1, and lines 1, 24 and 25, page 2, as recommended by this Department. The Department is advised that the failure to amend the bill as recommended by the Department was not intentional. It is believed that the changes are appro-

priate and that they are needed to clarify the purpose of the proposed legislation. The Bureau of the Budget, in its report to the Department under date of September 28, 1937, did not object to such amendments.

It is accordingly recommended that the bill if enacted be amended to include these changes.

Sincerely yours,

HARRY H. WOODRING,
Secretary of War.

[H. Rep. No. 1648, 75th Cong., 3d sess.]

The Committee on the Territories, to whom was referred the bill (H. R. 7778) to amend section 26, title 1, chapter 1, of the act entitled 'An act making further provision for a civil government of Alaska, and for other purposes,' approved June 6, 1900, report it back to the House with the recommendation that the bill be amended as follows:

Page 2, line 15, strike the word 'War' and insert in lieu thereof 'the Interior.'

Page 2, line 23, strike the word 'War' and insert in lieu thereof 'the Interior.'

And that as so amended the said bill do pass.

By the provision of section 26 of the act of Congress approved June 6, 1900 (31 Stat. 329), the

laws of the United States relating to mining claims were extended to Alaska and provision was therein made that all land and shoal water between low and mean high tide on the shores, bays, and inlets of Bering Sea, within the jurisdiction of the United States, should be subject to exploration and mining for gold and other precious metals by citizens of the United States, or persons who have legally declared their intentions to become citizens of the United States. The act further provides that the Secretary of War may prescribe such general rules and regulations as are necessary for the preservation of order and the protection of the interests of commerce. It will be noted that the mining on tide lands, authorized by the act, embraced only the tide lands of the shores of Bering Sea and not all of the tide lands of Alaska. *The bill as introduced, sought to amend section 26 in only one particular, by extending the authority to mine the tide lands of all of the shore waters of Alaska.*

Upon the introduction of the bill, it was referred to the Secretary of War for the customary departmental report thereon. By letter addressed to the chairman of this committee dated October 14, 1937, the Secretary of War recommends that the bill be amended by placing full control of mining on all shores, bays, and inlets of Alaska within the jurisdiction of the United States in the Department of

the Interior since it was deemed advisable to have all mining laws and regulations administered by the Secretary of the Interior rather than by partial control with respect to the mining of tidelands under the Secretary of War. The amendments hereinabove recommended will accomplish that purpose.

The Bureau of the Budget has no objection to the passage of the bill.

The letter of the Secretary of War recommending the amendment of the bill as above indicated and its passage as so amended, is as follows:

War Department,
Washington, October 14, 1937.

Hon. Lex Green,
Chairman, Committee on the Territories,
House of Representatives, Washington, D. C.

Dear Mr. Green: The Department refers to your request of July 19, 1937, for a report on House bill 7778 to amend section 26, title 1, chapter 1 of the act entitled 'An act making further provision for a civil government for Alaska, and for other purposes,' approved June 6, 1900.

Section 26 of the act of Congress approved June 6, 1900 (31 Stat. 329), extended the laws of the United States relating to mining claims, mineral locations, and rights incident thereto, to Alaska

and provided that all land and shoal water between low and mean high tide on the shores, bays and inlets of Bering Sea, within the jurisdiction of the United States, shall be subject to exploration and mining for gold and other precious metals by citizens of the United States, or persons who have legally declared their intentions to become such. The law also provides that the Secretary of War may prescribe such general rules and regulations necessary for the preservation of order and the protection of the interests of commerce.

House bill 7778 proposes to extend the right to explore and mine for gold and other precious metals to all land and shoal water between low and mean high tide on all shores, bays, and inlets of Alaska within the jurisdiction of the United States. *This is the only amendment to Section 26 which is proposed.*

Since the Secretary of War is empowered to prescribe general rules and regulations necessary for the preservation of order and the protection of the interests of commerce, the Department advised the Bureau of the Budget on July 29, 1937, that it had no objection to the favorable consideration by Congress of House bill 7778. In response thereto, the Acting Director of the Bureau of the Budget forwarded to this Department a copy of a letter dated

August 20, 1937, which he received from the Assistant Secretary of the Interior suggesting that this bill be amended to place the control of mining on tidelands in the Department of the Interior, as this would be in accord with existing law governing the administration of mineral lands in Alaska.

A review of the past history of this legislation was made which showed that subsequent to the enactment of the original bill on June 6, 1900, rules and regulations were issued by the Headquarters Department of Alaska on July 14, 1900, providing for administration of the law by the commanding general of the Department of Alaska and by the nearest commander of the local military forces. Because of the withdrawal of military forces from stations adjacent to Bering Sea, these regulations were without means of administration and modified regulations were promulgated by the Secretary of War on August 21, 1934, providing for the administration of this law by the district engineer officer of the United States Army at Seattle, Wash. These regulations were submitted to the Secretary of the Interior for approval before being issued in view of the general supervision exercised by that Department over the government of Alaska.

In view of these facts and the suggestion made by the Acting Secretary of the Interior, this De-

partment advised the Bureau of the Budget that no objection to the proposed amendment of H. R. 7778 to place the control of mining on all shores, bays, and inlets of Alaska within the jurisdiction of the United States in the Department of the Interior could be forseen if the bill were further amended as stated therein.

The Bureau of the Budget on September 28, 1937, replied that there would be no objection by that office to the submission of such a report on the above-mentioned bill to your committee, provided such a report included the suggestion made by the Secretary of the Interior, and in which this Department acquiesced, placing the control of mining of tidelands in Alaska in the Department of the Interior.

Sincerely yours,

HARRY H. WOODRING
Secretary of War.

In compliance with clause 2a of rule XIII, existing law is printed below in roman with matter proposed to be ommitted enclosed in black brackets and new matter proposed to be inserted printed in italic:

'Sec. 26. The laws of the United States relating to mining claims, mineral locations, and rights

incident thereto are hereby extended to the Territory of Alaska: *Provided,* That subject only to such general limitations as may be necessary to exempt navigation from artificial obstructions, all land and shoal water between low and mean high tide on the shores, bays, and inlets of [Bering Sea] *Alaska,* within the jurisdiction of the United States, shall be subject to exploration and mining for gold and other precious metals by citizens of the United States, or persons who have legally declared their intentions to become such, under such reasonable rules and regulations as the miners in organized mining districts may have heretofore made or may hereafter make governing the temporary possession thereof for exploration and mining purposes until otherwise provided by law: *Provided further,* That the rules and regulations established by the miners shall not be in conflict with the mining laws of the United States; and no exclusive permit shall be granted by the Secretary of [War] *the Interior* authorizing any person or persons, corporation or company, to excavate or mine under any of said waters below low tide, and if such exclusive permit has been granted it is hereby revoked and declared null and void; but citizens of the United States or persons who have legally declared their intention to become such shall have the right to dredge and mine for gold or other

precious metals in said waters, below low tide, subject to such general rules and regulations as the Secretary of [War] *the Interior* may prescribe for the preservation of order and the protection of the interests of commerce; such rules and regulations shall not, however, deprive miners on the beach of the right hereby given to dump tailings into or pump from the sea opposite their claims, except where such dumping would actually obstruct navigation, and the reservation of a roadway sixty feet wide under the tenth section of the Act of May 14, 1898, entitled "An Act extending the homestead laws and providing for the right of way for railroads in the District of Alaska, and for other purposes', shall not apply to mineral lands or town sites.'"

Quotations from Lindley & Stenfjeld vs. Espe:

"The reasons assigned by the courts for permitting junior lode claimants to place the lines of their locations upon or across lands which have been previously appropriated, a matter fully discussed in preceding sections, do not apply with equal force to placers." (Lindley on Mines 3rd Ed. Vol. 2, p. 1055)

Stenfjeld v. Espe (C. C. A. 9th) 171 Fed. on 828:

"This ruling is based upon considerations which have no application whatever to placer locations. In the placer mine the surface is the thing located, and the possession of the surface is absolutely essential to the mining operations. In order to obtain the surface that is open to location, there is no necessity to invade the surface of other claims or to place boundary lines thereon.*** *No reason can be suggested for permitting a junior locator of a placer claim to lay his lines across a claim already located.*"

Stenfjeld vs. Espe, 171 Fed. on 828:

> "The plaintiffs in error found the land in controversy, unmarked and unoccupied. Surrounding it they found other valid claims. They had the right to assume that the land was vacant and unappropriated. It would be an intolerable burden if the prospector who finds an unoccupied parcel of land, this surrounded by other locations, were required to search the surrounding country to ascertain whether the locators of an association claim had not placed four posts, one half a mile distant from each other, with the intention of appropriating segregated fractions of land lying between the boundaries of subsisting claims."